

**DATO' SERI ANWAR IBRAHIM v. TAN SRI DATO'
HJ MUHYIDDIN HJ MD YASSIN & ANOR**

HIGH COURT MALAYA, KUALA LUMPUR

MARIANA YAHYA J

[JUDICIAL REVIEW NO: WA-25-31-01-2021]

20 JUNE 2021

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ADMINISTRATIVE LAW: *Judicial review – Application for – Judicial review against decision of Prime Minister and Government of Malaysia to advise Yang di-Pertuan Agong to promulgate s. 14 of Emergency (Essential Powers) Ordinance 2021 ('Ordinance') – Parliament prorogued and suspended – Challenge against constitutionality and validity of ss. 14 & 18 of Ordinance and art. 150(6) & (8) of Federal Constitution – Whether court seized with jurisdiction to hear matter – Whether applicant had arguable case that merited further submissions at substantive hearing*

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The Prime Minister of Malaysia ('first respondent') and the Government of Malaysia ('second respondent') declared the Movement Control Order ('MCO'), to contain and curb the spread of Covid-19, and this was followed by a Proclamation of Emergency ('POE') by the Yang di-Pertuan Agong ('YDPA'), made pursuant to art. 150(1) of the Federal Constitution ('FC') and upon the advice of the first and/or second respondents ('respondents' decision to advise the YDPA'). The applicant claimed that, as a result of the POE, the Emergency (Essential Powers) Ordinance 2021 ('Ordinance') was promulgated and gazetted where, *inter alia*, Parliament was prorogued and suspended pursuant to ss. 14 and 18 of the Ordinance, resulting in a grave and serious denial of the pivotal role of Parliament in guaranteeing transparent debate and ensuring accountability of the Government and ensuring a proper check and balance of the Executive in the passing of laws during the pandemic. Hence, the present application for judicial review where the applicant sought to challenge (i) the respondents' decision to advise the YDPA; and (ii) the constitutionality and validity of (a) ss. 14 and 18 of the Ordinance; and (b) art. 150(6) and (8) of the FC, having regard to arts. 4(1), 8 and 121(1) of the FC. Objecting to the application, the respondents argued that: (i) the court was not seized with the jurisdiction to hear the matter as art. 150(6) and (8) of the FC expressly prohibited any challenges to the validity of the Ordinance in any form and on any ground; and (ii) the applicant did not have an arguable case that merited further submissions at substantive hearing.

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Held (dismissing application):

- (1) Article 150(6) and (8) of the FC expressly prohibit any challenges to the validity of the Ordinance in any form and on any ground. Article 150(8) of the FC was only inserted in 1981, through a constitutional

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- A amendment, which resulted in the emergency proclamation and ordinances immunised from judicial review. Most importantly, when that was done, it becomes an integral part of the FC; it is the supreme law and, accordingly, could not be said to be at variance with itself. The intention of Parliament, on the amendment of art. 150(8) of the FC
- B could be observed in the Hansard of Parliament during the second and third reading of the amendment of art. 150 of the FC. Based on the Hansard, the intention of Parliament was to exclude judicial review of the decision in proclaiming emergency and the Ordinance made under the emergency law. The reason was to avoid important information from being heard in court in a situation where no effective and immediate action is taken. The intention of the Legislators were clear; the insertion of art. 150(6) and (8) of the FC was meant to shut the doors of the court from any challenge of the law made during the emergency and the POE. (paras 13-16)
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- D (2) Article 150(6) and (8) of the FC was validly enacted by Parliament pursuant to the power vested in it by art. 121(1) of the FC. It had not, in any way, violated the doctrine of separation of powers and/or was not inconsistent with art. 4(1) of the FC. Hence, art. 150(6) and (8) is constitutional and no judicial review could be made to challenge against the decision of the YDPA under art. 150(1) and 150(2B) of the FC. The court had no jurisdiction to entertain the judicial review application. (paras 25 & 26)
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- F (3) Article 40 of the FC provides that the YDPA carries out his duties under the FC under the advice of the Prime Minister and the Cabinet. Except for His Majesty's function under art. 40(2) of the FC, which provides that the YDPA may act in his discretion, the other functions to be exercised by him under the FC or Federal law shall be exercised in accordance with the advice of the Cabinet or Minister acting under the general authority of the Cabinet. Since the applicant was not challenging the decision of the YDPA on the POE, there was no reason why the advice, which led to the YDPA's decision, should be separated or fragmented from the decision itself. The effect was still the same; the advice remained as an advice and not a legal decision. The decision-making process was one and could not be fragmented. (paras 27, 28 & 33)
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- H (4) The advice was not a decision within the ambit of O. 53 r. 2(4) of the ROC for judicial review. The subject matter had been settled by law. There was no arguable case for the applicant and the application was frivolous. It was the power of the YDPA to declare the emergency, not the Cabinet, which could not be challenged in the court of law. It would also be against public policy to allow the Prime Minister and/or
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Cabinet's decisions to be subjected to judicial review. It would not be in the best interest of the nation to allow such important information to be discussed in public. (paras 36, 37 & 41) A

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Perlantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC (*refd*) B

Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC (*refd*)

Council of Civil Service Unions v. Minister for Civil Service [1985] AC 374 (*refd*)

Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor [2010] 5 CLJ 369 FC (*refd*) C

Dato' Seri Anwar Ibrahim v. PP [2000] 2 CLJ 695 CA (*refd*)

Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC (*refd*)

In Re Application by Ong Eng Guan for an Order of Prohibition in re appointment of S.H.D Elias [1959] 1 LNS 35 HC (*refd*)

Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals [2018] 3 CLJ 145 FC (*refd*) D

Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC (*refd*)

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC (*refd*)

R (on the Application of Miller) (Appellant) v. The Prime Minister (Respondent) Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland) [2019] UKSC 41 (*refd*) E

Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals [2021] 4 CLJ 1 FC (*refd*)

Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case [2017] 5 CLJ 526 FC (*refd*)

Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors [2021] 3 CLJ 87 CA (*refd*) F

Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA (*refd*)

Tun Dato' Hj Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294 SC (*refd*) G

Legislation referred to:

Emergency (Essential Powers) Ordinance 2021, ss. 14, 18

Federal Constitution, arts. 4(1), 8, 40(2), 121(1), 150(1), (2B), (3), (5), (6), (8)

Immigration Act 1959/63, s. 59A

Prevention of Crime Act 1959, s. 15B

Rules of Court 2012, O. 53 r. 2(4)

Rules of the High Court 1980, O. 53 r. 2(4) H

For the appellant - Ram Karpal Singh, Sangeet Kaur Deo & Rayveni Asogan; M/s Karpal Singh & Co

For the Attorney General Chambers - Narkunavathy Sundareson; SFC, Wan Hazlin Suraya Wan Sharif & Mohammad Sallehuddin Md Ali; FCs

Watching Brief:

For the Malaysian Bar Council - Colin Andrew Pereira; M/s Goh Wong Pereira

Reported by Najib Tamby I

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JUDGMENT

Mariana Yahya J:

Introduction

- B [1] The applicant on 25 January 2021 filed an application for leave to commence judicial review proceedings pursuant to O. 53 of the Rules of Court 2012 (ROC 2012).
- [2] The applicant seeks *inter alia* the following reliefs:
- C (i) A declaration that the decision of the Cabinet, led by the Prime Minister of Malaysia, Tan Sri Dato' Haji Muhyiddin bin Haji Mohd Yassin to advise the Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah to promulgate s. 14 of the Emergency (Essential Powers) Ordinance 2021 which has resulted in the prorogation and/or suspension of Parliament and is unlawful, unconstitutional and therefore null and void and of no effect;
- D (ii) A declaration that the advice given by the Cabinet, led by the first respondent, Tan Sri Dato' Haji Muhyiddin bin Haji Mohd Yassin to the Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah to promulgate s. 14 of the Emergency (Essential Powers) Ordinance 2021 which has resulted in the prorogation and/or suspension of Parliament was *ultra vires* his/their constitutional and/or statutory and/or express and/or implied duty as the Prime Minister of Malaysia and/or his Cabinet;
- E (iii) A declaration that s. 14 of the Emergency (Essential Powers) Ordinance 2021 is unlawful and therefore null and void and of no effect;
- F (iv) A declaration that the prorogation and/or suspension of Parliament as a consequence of s. 14 of the Emergency (Essential Powers) Ordinance 2021 is unlawful and therefore null and void and of no effect;
- G (v) A declaration that art. 150(6) of the Federal Constitution is inconsistent with art. 4, art. 8 and art. 121 of the Federal Constitution and is as a result, unconstitutional, null and void and of no effect;
- H (vi) A declaration that art. 150(8) of the Federal Constitution is inconsistent with art. 4, art. 8 and art. 121 of the Federal Constitution and is as a result, unconstitutional, null and void and of no effect;
- I (vii) A declaration that that s. 14 of the Emergency (Essential Powers) Ordinance 2021 is inconsistent with art. 150(3) and art. 150(5) of the Federal Constitution and is as a result, unconstitutional, null and void and of no effect;

- (viii) A Declaration that that s. 18 of the Emergency (Essential Powers) Ordinance 2021 is inconsistent with art. 4 of the Federal Constitution and is as a result, unconstitutional, null and void and of no effect; A
- (ix) An order for *certiorari* to quash the decision by the first and second respondents to give the advice as stated in paras. (i) and (ii) above; B
- (x) An order for *mandamus* directing the first and second respondents herein to advise the Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah to revoke s. 14 of the said Ordinance forthwith; B
- (xi) No order as to costs; and C
- (xii) Any other relief and/or order deemed necessary and/or just by this Honourable Court.

Brief Facts

[3] In an attempt to contain and curb the spread of COVID-19, the first and second respondents declared a Movement Control Order (“MCO”) in January, 2021. The said MCO declared by the Perikatan Nasional Government under the lead of the first respondent, was followed by a proclamation of emergency by the Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah on 11 January 2021, which was published in the Federal Government *Gazette* on 12 January 2021 as P.U. (A) 7/2021 (“the said proclamation”). The proclamation was made pursuant to art. 150(1) of the Federal Constitution. Resulting from the proclamation, the Yang di-Pertuan Agong, pursuant to art. 150(2B) of the Federal Constitution promulgated the Ordinance. D E F

[4] The first respondent in his speech dated 12 January 2021 said *inter alia*:

- i. Yesterday I was granted an audience with the Yang di-Pertuan Agong on 11.1.2021 to present advise by the Cabinet for His Majesty to issue a Proclamation of Emergency in accordance with Article 150(1) of the Federal Constitution to declare a state of Emergency for the whole Federation effective from January, 11, 2021 to August 1st, 2021. G
- ii. After considering the advice of the Cabinet, His Majesty the Yang di-Pertuan Agong was satisfied that there was a need to issue an Emergency Proclamation to enable the Ordinance to be promulgated under Clause [2B] of Article 150 as to provide the necessary power to curb and prevent further spread of COVID-19 pandemic in this country. H

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A [5] The reasons cited by the first respondent as the basis of his advice to the Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah, as per his speech text, were *inter alia*, as follows:

B 5. In this regard, as a whole world is currently facing the threat of the COVID-19 pandemic which has directly become a major threat to the economic life of the people in this country, a declaration of emergency can be made by His Majesty the King, the Yang di-Pertuan Agong. Apart from the sharp increase in positive COVID-19 cases, there are several states in Malaysia such as Johor, Pahang and Kelantan currently experiencing heavy flooding, directly posing major threats to the safety and economic life of the people.

C 6. As I explained when announcing the implementation of the Movement Control Order yesterday, COVID-19 infection cases are on the rise and show no sign of decline in the near future. Therefore, the Government needs to have certain powers to ensure that this pandemic can be curbed more effectively and the health services provided to the people are not
D cripple.

E [6] The applicant claimed that as a result of the said proclamation, the Emergency (Essential Powers) Ordinance 2021 was promulgated and gazetted wherein, among others, Parliament was prorogued and suspended pursuant to s. 14 of the said Ordinance. The prorogation and suspension of
F Parliament promulgated by the said Ordinance results in a grave and serious denial of the pivotal role of Parliament in guaranteeing transparent debate and ensuring accountability of the Government and ensuring a proper check and balance of the Executive in the passing of laws during the pandemic. The applicant argued that the said decision and/or advice is flawed both in process and in substance.

G [7] Dissatisfied with the decision and/or advice of the respondents, the applicant filed this judicial review application. The impugned decision is the decision of the first respondent and/or second respondent to have advised the YDPA Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Biliah Shah to prorogue and/or suspend Parliament and to have advised the promulgation of ss. 14 and 18 of the Emergency (Essential Powers) Ordinance 2021 ("the said Ordinance"). The applicant also challenged the constitutionality and validity of ss. 14 and 18 of the said Ordinance, art. 150(6) and art. 150(8) of the Federal Constitution.

H [8] Having perused the cause papers, this court is of the view that the issues to be determined are as follows:

I (i) Whether arts. 150(6) and (8) of the Federal Constitution are unconstitutional having regard to *inter alia* arts. 4(1), 8 and 121(1) of the Federal Constitution, and as a result null and void and of no legal effect;

- (ii) Whether the decision of the Cabinet, led by the first respondent to advice the Yang di-Pertuan Agong to promulgate s. 14 of the Emergency (Essential Powers) Ordinance 2021 is amenable for judicial review; and A
- (iii) Whether a *mandamus* order can be made to direct the respondents to advice the Yang di-Pertuan Agong to revoke s. 14 of the said Ordinance. B
- [9] Before going further, this court has to remind itself that it should not go into the merit of the case at leave stage, its role is only to see if the applicant's application for leave is frivolous. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-justiciable. (See *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927; [2006] 5 MLJ 60, CA, para 10). C
- [10] It is pertinent to note that the applicant is not challenging the decision of the Yang di-Pertuan Agong in issuance of the Proclamation of Emergency under art. 150 of the Federal Constitution but only the advice of the respondents. The applicant's counsel argued that art. 150(8) does not apply to the advice of the first respondent and even if it applies, arts. 150(6) and (8) are inconsistent with arts. 4(1) and 121(1) of the Federal Constitution and therefore void in any event. D
- [11] The learned Senior Federal Counsel for the Attorney General Chambers objecting to the applicant's application for leave on two grounds: E
- (i) this court has no jurisdiction to hear the matter as art. 150(6) and (8) of the Federal Constitution expressly prohibited any challenges to the validity of the Ordinance in any form and on any ground; and F
- (ii) the applicant does not have an arguable case that merits further submissions at substantive hearing.

Issue 1

Whether Articles 150(6) And (8) Of The Federal Constitution Are Unconstitutional Having Regard To Inter Alia Articles 4(1), 8 And 121(1) Of The Federal Constitution, And As A Result Null And Void And Of No Legal Effect G

[12] Before going further on the issue of advice by the respondents and other related issues as prayed for by the applicant, the court is of the opinion that the issue whether arts. 150(6) and (8) of the Federal Constitution are unconstitutional having regard to *inter alia* arts. 4(1), 8 and 121(1) of the Federal Constitution has to be dealt with first by this court. H

[13] The source of the power to promulgate the Ordinance is in art. 150 of the Federal Constitution. The extent and limits of that power depends on the express provisions of art. 150. Article 150 of the Federal Constitution cl. (6) and (8) provides as follows: I

A Article 150 Proclamation of Emergency

(6) Subject to Clause (6A), no provision of any ordinance promulgated under this Article, and no provision of any Act of Parliament which is passed while a Proclamation of Emergency is in force and which declares that the law appears to Parliament to be required by reason of the emergency, shall be invalid on the ground of inconsistency with any provision of this Constitution.

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(8) Notwithstanding anything in this Constitution:

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(a) the satisfaction of the Yang di-Pertuan Agong mentioned in Clause (1) and Clause (2B) shall be final and conclusive and shall not be challenged or called in question in any court on any ground; and

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of:

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(i) a Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) the continued operation of such Proclamation;

(iii) any ordinance promulgated under Clause (2B); or

(iv) the continuation in force of any such ordinance.

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In brief, art. 150(6) and (8) of the Federal Constitution expressly prohibits any challenges to the validity of the Ordinance in any form and on any ground. Article 150(8) of the Federal Constitution was only inserted in 1981 through a constitutional amendment which resulted the emergency proclamation and ordinances immunised from judicial review. Most importantly, when that is done, it becomes an integral part of the Constitution; it is the supreme law, and accordingly it cannot be said to be at variance with itself.

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[14] This court is minded to appreciate the intention of Parliament on the amendment of art. 150(8) at the material time and this can be observed in the Hansard of the Parliament during the second and third reading of the amendment of art. 150 of the Federal Constitution on 9 April 1981. The Deputy Prime Minister, Dato' Seri Dr. Mahathir bin Mohamad stated as follows:

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Tuan Yang di-Pertua, cadangan pindaan Perkara 150 melibatkan beberapa fasal. Tujuan yang pertama ialah bagi membolehkan Yang di-Pertuan Agong membuat perisytiharan darurat sebelum berlakunya peristiwa sebenar yang mengancam keselamatan dan ekonomi negara. Yang kedua ialah bagi membolehkan Yang di-Pertuan Agong mengeluarkan perisytiharan-perisytiharan yang berbeza dan selagi perisytiharan tersebut masih berkuatkuasa Yang di-Pertuan Agong boleh membuat Ordinan-Ordinan semasa kedua-dua Dewan tidak bersidang dan Ordinan-Ordinan

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ini berkuatkuasa sama seperti yang diluluskan oleh Parlimen. Di samping itu cadangan pindaan ini adalah bagi menentukan bahawa sebab-sebab Yang di-Pertuan Agong mengisytiharkan darurat, Perisytiharan Darurat dan kuatkuasanya serta Ordinan-Ordinan dan kuatkuasa Ordinan-Ordinan tersebut tidak boleh dicabar di mana-mana Mahkamah. Takrif 'sitting' juga dimasukkan di mana takrif 'sitting' bagi Perkara ini ialah semasa Dewan menjalankan urusannya.

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Cadangan pindaan kepada Perkara 150 ini adalah bagi memperkemaskan Perisytiharan Darurat dan Ordinan-Ordinan yang dibuat di bawah kuasa ini. Oleh itu walaupun pada dasarnya pindaan-pindaan melibatkan banyak fasal-fasal tetapi dari segi maksudnya adalah tidak banyak berbeza dengan peruntukan yang ada mengenai Perkara ini, iaitu bagi mengadakan satu peruntukan Darurat di dalam Perlembagaan, yang mana ini sangat penting bagi keselamatan dan ketenteraman negara.

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Kelemahan yang ada pada Perkara 150 adalah berpandukan kepada pendapat Privy Council semasa memutuskan kes *Teh Cheng Poh*. Sebagaimana Ahli-ahli Yang Berhormat sedia maklum, Teh Cheng Poh adalah seorang banduan yang dikenakan hukuman mati di bawah Akta Keselamatan Dalam Negeri yang merayu ke Privy Council. Privy Council berpendapat bahawa apabila sahaja Parlimen dipanggil bersidang (sitting) ianya dianggap masih bersidang sehingga masa Parlimen diberhenti (prorogued) atau dibubarkan (dissolved), Oleh itu Yang di-Pertuan Agong tidak mempunyai kuasa membuat Ordinan Darurat sehingga Parlimen diberhentikan atau dibubarkan. Keadaan sedemikian akan menimbulkan kesulitan pada masa Kerajaan perlu mengambil tindakan serta-merta demi keselamatan negara.

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Adalah menjadi tugas utama bagi Kerajaan menjamin dan mengekalkan keselamatan dan ketenteraman negara setiap masa. Oleh itu sangatlah perlu bagi Kerajaan diberi kuasa yang luas bagi mengambil apa-apa tindakan yang difikirkan perlu bagi maksud untuk mengekalkan keselamatan dan ketenteraman negara. Perisytiharan darurat adalah satu-satunya tindakan yang perlu diambil jika terdapat bukti-bukti yang menunjukkan bahawa jika tindakan yang berkesan tidak diambil dengan secepat mungkin besar kemungkinan akan berlaku huru-hara di dalam negara yang akan melibatkan pengorbanan nyawa dan kehancuran harta benda orang-orang yang tidak berdosa. Maklumat-maklumat seperti itu tidaklah bijak dikemukakan di Mahkamah atas sebab-sebab keselamatan. Oleh itu sangatlah penting perisytiharan darurat tidak boleh dicabar di Mahkamah. Di samping itu adalah sangat penting dimasukkan peruntukan yang membolehkan perisytiharan darurat dibuat sebelum terjadinya peristiwa sebenar, kerana kita tidak mahu melihat terjadinya pertumpahan darah dan negara diancam oleh peristiwa-peristiwa sebenar yang tidak dapat dielakkan jika tindakan yang berkesan tidak diambil dengan secepat mungkin.

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- A Dengan pindaan Perkara 150 ini, walaupun Yang di-Pertuan Agong mempunyai kuasa yang luas di dalam Perisytiharan Darurat tetapi saya penuh yakin yang Baginda dan Kerajaan akan menggunakan kuasa ini sebijak-bijaknya.
- B [15] Looking at the Hansard on the tabling of the Rang Undang-Undang (RUU) for the amendment of art. 150(6) and (8) dated 9 April 1981, it is crystal clear that the intention of the Parliament was to exclude judicial review of the decision in proclaiming emergency and the Ordinance made under the emergency law. The reason forwarded by the Deputy Prime Minister when tabling the Bill was to avoid important information from being heard in court in a situation where no effective and immediate action taken. Such information if revealed, would likely turn the country into chaos and could result in destruction of property and loss of lives of the innocent.
- C [16] Hence, based on the Hansard, the intentions of the Legislators were clear. The insertion of art. 150(6) and (8) was meant to shut the doors of the court from any challenge of the law made during the emergency and the proclamation of emergency by the Yang di-Pertuan Agong. These amendments are sensible amendments and it was done for the national interest.
- D [17] It is interesting to note that the effect of art. 150(8) of the Federal Constitution was discussed in *Dato' Seri Anwar Ibrahim v. PP* [2002] 3 CLJ 457 at p. 469 & 470; [2002] 3 MLJ 193, at p. 208, FC, where the Federal Court speaking through Justice Haidar FCJ, held that no challenge could be made to the continued operation of ordinances made under art. 150 of the Federal Constitution. His Lordship remarked that:
- E ... Here we are dealing with the law that was promulgated under special provisions of Part XI of the Constitution, which is, art. 150 (the proclamation of emergency). *It should be noted that there is the overriding provision in cl. (8)(b) of art. 150 itself that 'notwithstanding anything in this Constitution' the court shall have no jurisdiction to entertain or determine any application in whatever form, on any ground, regarding the validity of, inter alia, the continuation in force of the Ordinance. It may be argued that such a constitutional provision would amount to 'closing the doors of the court' and is therefore harsh and unjust. Our answer is that this issue should be addressed to the Legislature and not the courts by those who disagreed with such provision and they have their remedy at the ballot box (Lok Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187 at p. 188).*
- F (emphasis added)
- G [18] The effect of such clause was also referred to in *Dato' Seri Anwar Ibrahim v. PP* [2000] 2 CLJ 695; [2000] 2 MLJ 486, CA. The Court of Appeal held that by virtue of art. 150(8) of the Federal Constitution, the court has no jurisdiction to entertain or determine any application regarding the validity of the continuance in force of the Ordinance. Justice Lamin PCA stated as follows:
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... In other words, even after the process of annulment has been completed with the result that the Ordinance has been properly and finally annulled, that does not prevent the Yang di-Pertuan Agong from issuing another Ordinance under cl. (2B) and his decision to do so cannot be questioned by virtue of cl. (8) of art. 150. The answer to the problem in the present case is found in sub-cl. (b) of cl. (8) and it reads ...

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It is clearly stipulated under para (iv) of sub-cl (b) above, that the court has no jurisdiction 'to entertain or determine any application, question or proceeding, in whatever form, on any ground regarding the validity of 'the Ordinance' or 'the continuation in force of any such Ordinance'. Now that no resolution has been laid and passed by the Dewan Negara, Ordinance 22 must be taken to continue to have the full force of law. Whatever the reason or ground advanced or intention expressed that a resolution would as a matter of course be tabled before the Dewan Negara, we will go so far as to say that the court in this country has no power even to express an opinion.

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(emphasis added)

[19] In *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] MLJU 12, FC, the Federal Court by majority held that the ouster clause provision under s. 59A of the Immigration Act that limits the power of the court for judicial review was made within the power of the Parliament to legislate conferred under art. 121(1) of the Federal Constitution. The provision of s. 59A is therefore constitutional and is not in breach of the doctrine of the separation of powers, which cannot in any event prevail over the written constitution.

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[20] In a strong-worded judgment, Justice Abdul Rahman Sebli FCJ, held as follows:

[163] With all due respect, *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* had been misconstrued and misapplied by the appellant. There is absolutely nothing in the judgments to say that Article 121(1) of the Federal Constitution has no force of law to confer on Parliament the power to enact ouster clauses such as section 59A of the Immigration Act. On the contrary, *Semenyih Jaya* in fact recognised the power of the legislature to enact laws limiting appeals by declaring the finality of a High Court order because to hold otherwise would be contrary to subsection 68(1)(d) of the Courts of Judicature Act 1964.

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[164] *Semenyih Jaya* is authority for the proposition that a non-judicial body cannot bind the superior courts, *Indira Gandhi* for the proposition that Syariah courts are not of equal status to the superior civil courts while *Alma Nudo Atenza* is authority on the constitutionality of section 37A of the Dangerous Drugs Act 1952. They are not, first of all, cases on the validity of section 59A of the Immigration Act an ouster clause that draws its legitimacy and force of law from Article 121(1) of the Federal Constitution and which this court in *Sugumar Balakrishnan* had held to be valid law.

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- A [165] Further, even if they are ouster clauses, the impugned statutory provisions in the three cases are not ouster clauses in the mould of section 59A of the Immigration Act. Thus, the observations in those cases where they touch on the constitutional point raised in the present appeal are at best *obiter dicta* and should not have been given too much emphasis on.
- B [166] To reiterate, the question to ask in the context of the present case is not whether section 59A of the Immigration Act is inconsistent with or is in violation of the doctrine of separation of powers or has destroyed the basic structure of the Federal Constitution but whether it is inconsistent with Article 121(1) of the Federal Constitution. That is the test to determine if the post-Merdeka law is void.
- C [167] And *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza* cannot be read, as the appellant seems to be reading them, as deciding that Parliament has no power to amend the Federal Constitution. As Suffian LP said 45 years ago in *Phang Chin Hock v. PP* [1979] 1 LNS 67; [1980] 1 MLJ 70:
- D If it is correct that amendments to the Constitution are valid only if consistent with its existing provisions, then clearly no change whatsoever may be made to the Constitution; in other words Art. 159 is superfluous, for the Constitution cannot be changed or altered in any way, as if it has been carved in granite.
- E [168] Quoting the words of the Privy Council in *Bribery Commissioners v. Ranasinghe* [1965] AC 172 the learned judge went on to say:
- F ... a constitution [certainly our constitution] can, indeed, be altered or amended by the legislature, if the regulating instrument so provides and if the terms of those provisions are complied with and the alteration or amendment may include the change or abolition of those very provisions.
- G [169] Incidentally, Suffian LP's view accords with the view expressed by Lord Bingham in the Privy Council case of *Director of Public Prosecution of Jamaica v. Mollison* [2003] 2 WLR 1160 at 1170 where he said that "a constitution is not trapped in a time-warp but must evolve over time to reflect the developing needs of society".
- [21] As pointed out by Justice Abdul Rahman Sebli FCJ in *Maria Chin* (*supra*), the doctrine of separation of powers cannot override the written terms of the Federal Constitution, the supreme and highest law in the land. As art. 4(1) of the Federal Constitution clearly provides for the supremacy of the Constitution, it is necessary to examine whether arts. 150(6) and (8) are inconsistent with it. As pointed out earlier, those provisions are consistent with art. 121(1) of the Federal Constitution. Therefore, the argument that these provisions have violated the doctrine of separation of powers as the basic structure of the Constitution and art. 121(1) of the Federal Constitution is untenable. The provisions in the Constitution are
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equally important and cannot override one another. It cannot be said that the doctrine of separation of powers is more important than art. 150. This doctrine which is not written in the Constitution, cannot in any way override the written provisions of the Constitution.

[22] In another recent judgment of *Rovin Joty Kodeeswaran v. Lembaga Pencegahan Jenayah & Ors And Other Appeals* [2021] 4 CLJ 1; [2021] MLJU 195, FC, the Federal Court also held that the ouster clause under s. 15B of Prevention of Crime Act 1959 (POCA) is valid and constitutional.

[23] This recent judgment of *Maria Chin (supra)* and *Ravin Joty (supra)* also has a very significant effect on the previous judgments in regards to the supremacy of the doctrine of separation of powers in the Federal Constitution. This judgment, now being the latest judgment of the highest court of the land ought to be followed as precedent. More importantly, this judgment of *Maria Chin* and *Ravin Joty* has diluted the judgments of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561, FC, *Indira Gandhi Mutho v. Pengarah Jabatan Agama Islam Perak & Ors And Other Appeals* [2018] 3 CLJ 145; [2018] 1 MLJ 545; FC and *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1, FC. Justice Abdul Rahman Sebli FCJ in his judgment held as follows:

[253] The doctrine of constitutional supremacy does not allow any doctrine of law to take precedence over the written terms of the Federal Constitution. Further, based on the historical antecedent of the Federal Constitution, section 59A of the Immigration Act is not constitutionally objectionable. Therefore, I reject the appellant's argument that section 59A of the Immigration Act is unconstitutional and has "no leg to stand on" in the light of *Semenyih Jaya*, *Indira Gandhi* and *Alma Nudo Atenza*.

[254] In the upshot, I hold that sections 59 and 59A of the Immigration Act are not void for being inconsistent with Article 4(1) read with Article 121(1) of the Federal Constitution. The limitation of the court's review power by section 59A of the Immigration Act falls squarely within the power of Parliament to legislate pursuant to the power conferred on it by Article 121(1) of the Federal Constitution and is not in breach of the doctrine of separation of powers, which cannot in any event prevail over the written constitution.

[24] Similarly, the Federal Court in *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147, FC also speaks about separation of powers and judicial power and held that:

[112] As a country based on the rule of law and the separation of powers, we should respect that whether it is desirable or not to abolish the mandatory death penalty, it must be for Parliament to make. As things stand now, the crucial point here is our Parliament has decided the punishment for trafficking of drugs should remain as it is. It follows that,

- A in my opinion, as the matter is an inherently legislative issue for Parliament to decide, it would be inappropriate for the courts now to declare the mandatory death sentence incompatible with art. 8 on the basis that Parliament violated the proportionality principle. Doing so would tantamount to challenging the policies underlying Parliament's decision to legislate the mandatory death sentence penalty. *Although we are*
- B *the guardians of the constitution, we must always recognise the proper constitutional role of courts. In cases such as the present case, we must avoid usurping the policy-making role of Parliament, which is a democratically elected institution. As I have stated at [28] above that like all legal powers, judicial power has constitutional limits, it is not our role to formulate policy. Court cannot substitute its view for the legislative policy decided by Parliament. In Lim Meng Suang v. Attorney-General [2015] 1*
- C *SLR 26 (CA), a case concerning the constitutionality of a criminal provision against acts of "gross indecency" between male persons, the court said, "it is impermissible for the courts to arrogate to themselves legislative powers – to become, in other words, 'mini-Legislatures'".*
- D [113] We cherish the doctrine of separation of powers. All three branches of the Government must respect each other's jurisdiction. The Judiciary must respect the prerogatives of Parliament. Judicial decision, which undermines Parliament's lawful authority, would turn the rule of law on its head. The courts have the duty to uphold the FC. Judges must restrain themselves and should resist the temptations to encroach into the areas reserved to the other separate branches. It is important to keep our FC
- E balanced. (emphasis added)
- [25] With the above said authorities, this court is of the view that art. 150(6) and art. 150(8) of the Federal Constitution were validly enacted by Parliament pursuant to the power vested in it by art. 121(1) of the Federal Constitution. It has not in any way violated the doctrine of separation of
- F powers and/or inconsistent with art. 4(1) of the Federal Constitution as argued by the applicant. Hence, art. 150(6) and (8) is constitutional and no judicial review can be made to challenge the decision of the Yang di-Pertuan Agong under art. 150(1) and art. 150(2B) of the Federal Constitution.
- G [26] Suffice to say the constitutionality of art. 150(6) and 150(8) of the Federal Constitution and the effect to ss. 14 and 18 of the Ordinance, it is very clear that this court has no jurisdiction to entertain this judicial review application.
- Issue 2
- H *Whether The Decision Of The Cabinet, Led By The First Respondent To Advice The Yang Di-Pertuan Agong To Promulgate Section 14 Of The Emergency (Essential Powers) Ordinance 2021 Is Amenable For Judicial Review*
- I [27] Article 40 of the Federal Constitution provides that Yang di-Pertuan Agong carries out his duties under the Constitution under the advice of the Prime Minister and the Cabinet. It states as follows:

Yang di-Pertuan Agong to act on advice

40(1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution; but shall be entitled, at his request, to any information concerning the government of the Federation which is available to the Cabinet.

(1A) In the exercise of his functions under this Constitution or federal law, where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance with such advice.

(2) The Yang di-Pertuan Agong may act in his discretion in the performance of the following functions, that is to say:

- (a) the appointment of a Prime Minister;
- (b) the withholding of consent to a request for the dissolution of Parliament;
- (c) the requisition of a meeting of the Conference of Rulers concerned solely with the privileges, position, honours and dignities of Their Royal Highnesses, and any action at such a meeting,

and in any other case mentioned in this Constitution.

(3) Federal law may make provision for requiring the Yang di-Pertuan Agong to act after consultation with or on the recommendation of any person or body of persons other than the Cabinet in the exercise of any of his functions other than:

- (a) functions exercisable in his discretion;
- (b) functions with respect to the exercise of which provision is made in any other Article.

[28] It is observed that art. 40 of the Federal Constitution divides the functions of the Yang di-Pertuan Agong into two distinct categories, ie, those functions that His Majesty may exercise in his discretion and those that he must exercise or act in accordance with ministerial advice. Except for his function under art. 40(2) of the Federal Constitution which provides that the Yang di-Pertuan Agong may act in his discretion, the other functions to be exercised by him under the Constitution or federal law shall be exercised in accordance with the advice of the Cabinet or Minister acting under the general authority of the Cabinet.

[29] In *Dato' Seri Anwar Ibrahim v. Perdana Menteri Malaysia & Anor* [2010] 5 CLJ 369, FC, Justice Alauddin Mohd Sheriff PCA discussed the role of the Yang di-Pertuan Agong as a constitutional monarch to exercise his function and to act in accordance with the advice of the Cabinet. His Lordship held as follows:

- A [34] In *Merdeka University Bhd v. Government of Malaysia* [1981] CLJ 175; [1981] CLJ (Rep) (at p. 195) Abdoolcader J (as he then was) had this to say:
- It would perhaps be appropriate to clarify two matters at this exordial stage. First, the Yang di-Pertuan Agong is a constitutional monarch and is required under Article 40(1) of the Federal Constitution in the exercise of his function (except on certain matters that do not concern these proceedings) to act in accordance with collective or individual ministerial advice and not on his own initiative (*Balakrishnan v. Ketua Pengarah Perkhidmatan Awam Malaysia and Government of Malaysia* [1981] 2 MLJ 259.)
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- C [30] The applicant's counsel in their submission cited the House of Lords decision in *R (on the Application of Miller) (Appellant) v. The Prime Minister (Respondent) Cherry and others (Respondents) v. Advocate General for Scotland (Appellant) (Scotland)* [2019] UKSC 41 (*Miller*) and held that the Prime Minister's advice to Her Majesty Queen to prorogue Parliament was
- D unlawful. The applicant's counsel further submitted that the advice is justiciable and the court will intervene if the effect is sufficiently serious to justify such an exceptional course. The applicant firmly said that this leave application should be allowed as the matter is clearly justiciable because the issue concerns whether the advice of the Prime Minister was lawful or had
- E exceeded the powers conferred upon him.
- [31] The learned Senior Federal Counsel for the Attorney General Chambers in their submission submits that *Miller* case has no application in the applicant's application for leave. In *Miller*, the deliberations on the issue of justiciability proceed on the assumption that the House was seized with
- F the jurisdiction. In *Miller*, there was no question of the court's jurisdiction being ousted unlike in the present case. It was also submitted that in *Miller*, the House of Lords held that since the power to prorogue Parliament is a prerogative power recognised by common law, the extent and limits of the power is subject to common law principles.
- G [32] This court agrees with the Attorney General Chambers' submission that in the present matter, the source of the power to promulgate the Ordinance is in art. 150 of the Federal Constitution and art. 150(6) and (8) of the Federal Constitution expressly prohibits any challenges to the validity of the Ordinance in any form and or any ground. On this ground alone, *Miller*
- H case cannot stand as precedent for the applicant's application. Justice Rahman Sebli FCJ in *Maria Chin's* case at para. 124 of the judgment has clearly expressed that:
- It is therefore for our courts now to develop our own common law but it must not be done at the expense of the Federal Constitution.
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[33] Coming back to the issue of whether the advice of the respondents to the Yang di-Pertuan Agong to promulgate s. 14 of the Emergency (Essential Powers) Ordinance 2021 is amenable for judicial review, this court disagrees with the learned counsel for the applicant's submission on the grounds that the decision and the advice are all part and parcel of one process that culminated with the promulgation of the Ordinance by the Yang di-Pertuan Agong. Since the applicant is not challenging the decision of the Yang di-Pertuan Agong on the proclamation of emergency, this court sees no reason why the advice which led to the Agong's decision should be separated or fragmented from the decision itself. This court is of the view that the effect is still the same that the advice remained as an advice and it is not a legal decision. This court agrees with the AG's submission that the decision-making process is one and cannot be fragmented and cited the case of *Tan Sri Musa Hj Aman & Ors v. Tun Datuk Seri Panglima Hj Juhar Hj Mahiruddin & Ors* [2021] 3 CLJ 87; [2020] MLJU 2201, CA where the Court of Appeal held that:

Further, if a matter is found to be not justiciable, the decision-making process leading to the non-justiciable matter should also be not justiciable.

[34] On another point, it is to be highlighted that only legal decision can be entitled for judicial review. This has been decided in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandung Imej Seorang Yang Dikatakan Peguambela dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Perlantikan Hakim-Hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805, FC. The Federal Court speaking through Justice Raus Sharif FCJ (as His Lordship then was) held that only decision made by a decision making body is amenable for judicial review, within the ambit of O. 53 r. 2(4) of the RHC 1980. His Lordship further held that the Commission does not make legal decision but only make findings and recommendations. His Lordship cited the case of *Council of Civil Service Unions v. Minister for Civil Service* [1985] AC 374 (CCSU), where the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy. Further, His Lordship referred to the case of *Tun Dato' Hj. Mohamed Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 2 CLJ 739; [1988] 1 CLJ (Rep) 294, where Hashim Yeop Sani SCJ (as he then was) said:

The function of the Tribunal appointed under Article 125(3) of the Constitution is to enquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The Tribunal is a body which investigates and does not decide. It is performing a constitutional function. The Tribunal should not therefore be restrained from performing its constitutional function.

A [35] Justice Raus Sharif FCJ (as His Lordship then was) also highlighted another important issue that it is against public policy to allow findings of the Commission to be challenged in courts. Citing the judgment of Rose CJ in the case of *In Re Application by Ong Eng Guan for an Order of Prohibition in re appointment of S.H.D Elias* [1959] 1 LNS 35, His Lordship held that
B findings of any Commission established under Act 119 shall not be subjected to judicial review. If it is allowed to be challenged either at the outset or during its continuance by prohibition or at its conclusion by *certiorari*, its purpose will come to naught. His Lordship held as follows:

C **Hence we hold that it would be against public policy to subject the findings and recommendations of the Commission to judicial review.** In the present case, the video clip circulation on the internet had sparked furious debate questioning the independence of the judiciary. The image of the judiciary is being ridiculed. Obviously, it is not in the best interest of the judiciary and the nation as a whole to allow such debate and bad perception to continue without the public knowing the truth of the matter
D ...

[36] It is obvious that the application made before this Honourable Court is to challenge the advice given by the Prime Minister and/or the Cabinet to the Yang di-Pertuan Agong. It is the court's considered view that the said advice is not a decision within the ambit of O. 53 r. 2(4) of the ROC 2012
E for judicial review. It is not a body where decisions of it become legal decisions. After all, it is the power of the Yang di-Pertuan Agong to declare emergency, not the Cabinet, which cannot be challenged in the court of law (art. 150(8) of the Federal Constitution).

F [37] On top of that, it is the considered view of this court that it will be against public policy to allow Prime Minister and/or Cabinet's decisions be subjected to judicial review. It is not in the best interest of the nation to allow such important information be discussed in public. That would definitely create chaos. This in fact had been highlighted as the main reason for the amendment of art. 150 of the Federal Constitution when inserting art. 150(8)
G in ousting the court's power for judicial review on matters relating to the declaration of emergency. It must also be emphasised that the objective of art. 150(8) of the Federal Constitution, is to make the emergency Ordinances and emergency Acts of Parliament immunised from judicial review. It is also clear from the Hansard that the objective was to prevent matters involving
H national security be discussed in court.

[38] Hence, based on the above reasons, it is reiterated that the decision of the Prime Minister in advising the Yang di-Pertuan Agong is not amenable to judicial review. Since that art. 150(8) and (6) of the Federal Constitution is constitutional, issue regarding *mandamus* does not arise before this court.
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Conclusion

[39] Bearing in mind that this is an application for leave to commence judicial review proceedings under O. 53 of the ROC 2012, it is trite that test for leave to commence judicial review be complied with.

[40] Having considered the application, this court is of the view that the subject matter of this application is not amenable to judicial review. It is reiterated that art. 150(6) and (8) of the Federal Constitution is valid and constitutional. More importantly, art. 150(8) has shut the court's doors from any challenge or application be made against the proclamation and the ordinances enacted under the emergency law.

[41] It is obvious that the applicant has failed to cross the hurdle of the judicial review test ie, jurisdictional threshold. As discussed above, the subject matter in this case have been settled by law. It is clear that there is no arguable case for the applicant. This application for leave is frivolous.

[42] Thus, this application for leave to commence judicial review proceedings ought to be dismissed with no order as to costs.

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